

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	
)	
Dobson Cellular Systems, Inc.)	CC Docket No. 96-45
)	
Joint Petitions for Designation as Eligible)	
Telecommunications Carriers in the State of)	
New York)	

COMMENTS OF CITIZENS TELECOMMUNICATIONS COMPANY OF NEW YORK

Citizens Telecommunications Company of New York d/b/a Frontier Communications of New York (“Frontier”), by its attorney, respectfully submits these comments regarding the Joint Petitions of Dobson Cellular Systems, Inc. for Designation as Eligible Telecommunications Carriers in the State of New York (“Petition”) in its commercial mobile radio service (“CMRS”) license area in New York. Dobson filed two petitions – one for areas where Dobson seeks redefinition of rural telephone company (“RTC”) study areas and one for areas where it does not. With respect to Frontier, Dobson seeks to redefinition of two RTC study areas.

This matter is before the Commission because the New York Department of Public Service has determined that it lacks jurisdiction to designate Dobson, a CMRS carrier, as an eligible telecommunications carrier (“ETC”) in New York.

I. Introduction and Background

Dobson seeks to be designated as an ETC in its cellular license area in New York, which includes portions of study areas served by Frontier, Taconic Tel. Corp., Empire Tel. Corp., The Middleburgh Telephone Co., and State Tel. Co., all of which are RTCs.

Because Dobson seeks to be designated as an ETC in portions of these RTCs' study areas, it must demonstrate that it meets the minimum criteria of Section 214(e)(1) and that designating it as an ETC in the RTCs' study areas "is in the public interest."¹ Further, Dobson must demonstrate that it meets the requirements to have its designated service area redefined from the entirety of the RTCs' study areas to just the portions in which it is a commercial mobile radio service ("CMRS") licensee. Generally, Dobson is required to serve the entirety of every RTC's study area in which it is designated as an ETC.²

Specifically with respect to Frontier, Dobson provides CMRS in some, but not all, exchanges in study areas 154534 and 154532. Dobson does not serve the entirety of any of Frontier's study areas in New York.³

II. Designation Of Dobson As An ETC In Frontier's Study Area Is Not In The Public Interest

While Dobson attempts to dress up its arguments with reference to universal service issues, Dobson offers essentially the same argument that many other CMRS ETC applicants have offered with respect to the public interest issue. The argument, distilled to its essence, is that designating the applicant as an additional ETC in an RTC's study area creates competition,

¹ 47 U.S.C. § 214(e)(2).

² 47 U.S.C. § 214(e)(5).

³ Petition at 1-2 and Exhibit E.

competition is in the public interest, therefore designating the applicant as an additional ETC in the RTC's study area is in the public interest. This argument is both legally and factually flawed.

A. Dobson's Public Interest Argument is Legally Flawed

Consideration of competitive benefits in the public interest analysis is flawed for two reasons. First, it confuses the twin goals of the Communications Act – promotion of competition and advancement of universal service – and converts the USF mechanism from a means for promoting universal service to a means of promoting competition. Second, it totally nullifies the public interest test.

1. USF Is Not Intended To Promote Competition

In the 1996 Act, Congress established two goals – promotion of competition and advancement of universal service.⁴ In Sections 254 and 214(e), Congress established the goals of universal service and a mechanism for achieving those goals. The designation of ETCs is a critical part of the mechanism for achieving the goals of universal service. Rural ETCs are key to achieving the goals of universal service because they use the monies provided by the Universal Service Fund (“USF”) to provide to rural consumers the services supported by universal service at prices comparable to those charged in urban areas and at a high quality.

Promotion of competition is not a goal of universal service. Considerations of whether an applicant will be a stronger or better competitor if it is designated as an ETC and therefore receives USF monies are irrelevant to the purposes for which ETCs are designated.

Consideration of competitive issues in the public interest analysis is contrary to the statute in that it converts the USF mechanism into a means of promoting competition, which Congress never

⁴ Alenco Communications, Inc. v. FCC, 201 F.3d 608, 620 (5th Cir. 2000) (“Alenco”).

intended for it to do. The mechanism for promoting competition is found in Sections 251 and 252.

It is the funding of consumers, not carriers, that is required and proper under the Act.⁵ Considering competitive issues in the public interest analysis improperly results in the USF supporting not only consumers, but also every competitor regardless of whether it makes economic sense to fund every carrier and whether funding every carrier actually advances the goals of universal service.

At bottom, considering competitive issues in the public interest analysis thwarts Congressional intent, converts the USF mechanism to a means of promoting competition when it is supposed to advance universal service, and creates undue, and unsustainable, burdens on the USF.

2. Competitive Concerns Nullify The Public Interest Test

Considering competitive concerns in the public interest analysis under Section 214(e)(2) renders the public interest test completely meaningless because that will always result in the designation of additional ETCs in RTCs' study areas. Providing USF monies to any competitor will make that competitor stronger and more viable; thus it will always be in the public interest to designate additional ETCs if promotion of competition is a key factor in evaluating the public interest. If it were always in the public interest to designate additional ETCs in RTCs' study areas, however, there would be no need for the public interest test. Instead, Congress could have mandated the designation of multiple ETCs in RTC study areas, just as it did for non-rural study areas.

⁵ *Id.*

Congress, however, specifically required a public interest inquiry in RTC study areas and did not require that more than one ETC ever be designated in RTC study areas. Any public interest analysis that considers competitive benefits is therefore contrary to the statute. Senator Dorgan made clear Congress' view that "[in] some markets; namely, high-cost rural areas, competition may not serve the public interest."⁶

To avoid rendering the public interest test a nullity (and thereby violating a canon of statutory construction), it is necessary to engage in a factual analysis to determine on a case-by-case basis whether designating a specific applicant as an ETC in a specific RTC's study area promotes the goals of universal service.

B. Dobson's Public Interest Argument is Factually Flawed

Dobson asserts repeatedly that it competes with the RTCs, but offers no specific facts to demonstrate that it competes with them. While Dobson may compete with respect to services like interexchange and Internet services, it admits, as it must, that those services are not supported by universal service.⁷ It provides no facts specific to Frontier's study areas to demonstrate that it competes with Frontier or whether the benefits of competition are realized as a result of its provision of service in Frontier's study area. Absent such a showing, the Petition must be denied.

Moreover, Dobson's assertion that it competes with Frontier is incorrect. Dobson does not compete with Frontier.

Dobson provides a service that, at best, is complimentary to that offered by Frontier. Dobson's service is not viewed by consumers or by Frontier as a substitute. The fact that it is

⁶ 141 Cong. Rec. S7951.

⁷ *See, e.g.* Petition at 25-26.

available in Frontier's study area brings to consumers none of the benefits of true competitive entry.

Frontier and its affiliates have experienced true competitive entry. In those instances, Frontier has experienced a reduction in the number of lines it serves as customers elect to take service from the competitor rather than from Frontier. Frontier has been unable to quantify any similar line loss resulting from Dobson's provision of service, or from any other wireless carrier. The simple truth is that wireless service is not replacing wireline service in Frontier's study areas. Dobson does not compete with Frontier for the services supported by universal service, and providing it with USF monies will neither increase competition, nor produce the benefits of competition in Frontier's study areas.

Frontier is aware that some wireless ETC applicants have argued that they will be able to compete with wireline services if they are able to use USF monies to build out their networks into the hinterlands and away from heavily traveled highways and cities. Dobson claims to have done that already, but there are no discernable competitive benefits from its having done so.

In this regard, the Joint Board was absolutely correct in pointing out that designation of wireless carriers as ETCs has an especially pernicious impact on the USF because wireless service does not replace wireline service.⁸

III. Designation of Dobson As An ETC Will Not Advance Universal Service

The purpose and promise of universal service has already been fulfilled in Frontier's study areas. Quality service is available to all who request it at rates that reflect that some costs are recovered through the USF rather than end user rates. New York boasts a 95.2 percent

⁸ *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket 96-45, FCC04J-1 (rel. Feb. 27, 2004) ("Joint Board Recommended Decision") at ¶ 67.

subscriber rate, which exceeds the national average.⁹ Focusing on consumers rather than carriers, it is difficult to understand how designation of Dobson would further advance universal service.

Mobility and the allegedly “advanced services” that Dobson claims it will provide in the future are not supported services.¹⁰ Even the Joint Board has noted that mobility is not a supported service and should not be considered in evaluating the public interest under Section 214(e)(2).¹¹

Dobson therefore has presented no relevant or persuasive evidence to support its contention that designating it to be an ETC will advance universal service.

IV. Dobson Should Not Be Designated As An ETC For Less Than The Entirety of Each of The RTCs’ Study Areas

Generally, Dobson must serve the entirety of any RTC’s study area for which it is designated as an ETC. Dobson can only be relieved of this duty if both the state commission and the Commission agree on a different service area in light of recommendations of a Federal-State Joint Board.¹² At a minimum, there must be some recommendation from a joint board as to whether and when it would be appropriate to designate an additional ETC for less than an RTC’s entire study area.¹³ This, however, has not clearly occurred.

⁹ FCC Report “Trends in Telephone Service,” Industry Analysis and Technology Division, Wireline Competition Bureau (rel. May 14, 2004).

¹⁰ 47 C.F.R. § 54.101.

¹¹ Joint Board Recommended Decision at ¶ 63.

¹² 47 U.S.C. § 214(e)(5).

¹³ See 47 C.F.R. § 54.207(c)(1)(ii) and (d)(1)(ii). Frontier believes that the statute is correctly interpreted to require that a joint board examine each proposed redefinition and issue recommendations specific to each.

A. The Joint Board Has Not Issued A Recommendation To Designate Additional ETCs For Less Than An RTC's Entire Study Area

The one time that the Joint Board has discussed this issue at all, it expressly found no reason to depart from the statutory requirement that additional ETCs be required to serve an RTC's entire study area. The Joint Board said that it found, "no persuasive rationale in the record for adopting, at this time, a service area that differs from a rural telephone company's present study area."¹⁴ If anything, this is a recommendation from the Joint Board to not designate ETCs in RTC's study areas for less than the entire study area.

The Joint Board mentioned three factors that support its conclusion. Those factors are the potential for cream skimming, the distinct treatment of rural areas under the 1996 Act, and the administrative burden that would be placed on an RTC to change the way it calculates its costs for USF purposes if an additional ETC were designated for a service areas that was different from the RTC's study area. These factors were *not* presented by the Joint Board as the factors for states and the Commission to consider in determining whether to permit an additional ETC to serve less than an RTC's entire study area. Even if they were applied in that fashion, however, they weigh heavily in favor of enforcing the statutory requirement that Dobson serve the entirety of each of the RTCs' study areas.

1. Creamskimming

Frontier is aware that the Commission has previously stated that cream skimming is not a problem with respect to CMRS carriers that are seeking to be designated as ETCs to serve only the area for which they hold a CMRS license. Frontier agrees that it could be true that a CMRS

¹⁴ Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket 96-45, FCC 96J-3 (rel. Nov. 8, 199) at ¶ 172.

carrier that seeks to serve only its licensed area has no specific intent to game the USF system to obtain disproportionately high amounts of USF relative to the costs to serve the area where it seeks ETC status. As the Commission recently has recognized, lack of intent, however, does not reduce the negative impact on USF and the public interest that results from an additional ETC serving the lower cost portions of a study area to the exclusion of the higher cost areas.¹⁵

Applied here, the Commission's concern over the disparity in population density between served and non-served exchanges clearly demonstrates that Dobson will creamskim in the Upstate study area (154532). The areas Dobson seeks to serve are nearly 3 times more densely populated than the areas it does not seek to serve. It also seeks to serve 10 of the 15 most densely populated exchanges, including the first, second, fourth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, and fifteen most densely populated exchanges within the study area. In contrast, it serves only one of the 15 least densely populated exchanges.¹⁶

Under the circumstances, relieving Dobson of its statutory duty to serve the entire study area would result in exactly the harm that Congress intended to avoid when it created the requirement for additional ETCs to serve whole RTC study areas – competitors would serve the most densely populated parts of a study area and would not serve the most rural parts; thus leaving the rural parts behind.¹⁷

Disaggregating USF does not solve the problem with respect to wireless carriers in either Frontier study area at issue, and could even exacerbate it, to the extent that customers with billing addresses in higher cost areas often use their CMRS service primarily in low cost areas.

¹⁵ See Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, CC Docket 96-45, FCC 03-338 (rel. Jan 22, 2004) (“Virginia Cellular”) at ¶ 33, *recon. pending*.

¹⁶ See Petition at Exhibit E.

¹⁷ See 141 Cong. Rcd. S7951.

To the extent that this occurs, which is likely to be significant in rural areas, the amount of USF that a CMRS ETC receives is even more disproportionate to the costs to provide service in the areas where it actually provides service than if USF were not disaggregated. CMRS is most likely to be used in the lowest cost zones of rural areas because those are the centers of employment, healthcare, shopping, education, and healthcare. Exhibit E to the Petition demonstrates that the population densities of served exchanges vary widely. Thus, it should be obvious that Dobson will receive disaggregated support targeted to high cost exchanges for providing service in the more densely populated, lower cost exchanges. This weighs heavily in favor of enforcing the statutory requirement for Dobson to serve the entirety of the RTCs' study areas.¹⁸

2. Distinct Treatment of Rural Areas

The distinct treatment of rural areas under the Communications Act has not changed since the Joint Board made the statement at issue, so this factor also weighs in favor of requiring Dobson to serve the entirety of each of the RTCs' study areas. Dobson admits, as it must, that Congress has limited the applicability of interconnection, unbundling, and resale requirements in areas served by RTCs.¹⁹ Incredibly, Dobson then urges the Commission to simply ignore this factor by claiming that if the Commission finds that Dobson satisfies the public interest test under Section 214(e)(2), there is no need for the Commission to consider the distinct treatment of rural areas as part of the separate inquiry under Section 214(e)(5).

¹⁸ This is also a significant factor to be considered in determining whether designating Dobson as an ETC in the RTCs' study areas is in the public interest. It is difficult to understand how the public interest is served by designating Dobson as an ETC in the RTCs' study areas when that will almost assuredly lead to USF intended for the highest cost zones being redirected to services that Dobson provides in the lowest cost zones.

¹⁹ Petition at 18. Taken together, these limitations reduce the burdens that competition can place on RTCs. This is further evidence that Dobson's public interest argument should not be accepted.

Frontier agrees that the Commission, as part of its Section 214(e)(2) public interest inquiry, must consider the fact that Congress throughout the Act consistently created separate standards and requirements for areas served by RTCs than for areas served by non-rural carriers. This distinction can be seen in Sections 251 and 252, related to competition, and in Sections 254 and 214(e) related to universal service. At the same time, Frontier disagrees with Dobson that consideration of this fact in the context of the public interest test of Section 214(e)(2) negates the need for the Commission to consider it in making the separate determination under Section 214(e)(5) as to whether an additional ETC should be relieved of its obligation to serve the entirety of the RTC's study area.

B. Dobson Can Provide Service Outside Of Its CMRS License Area

Additionally, Dobson's claim that it cannot provide service outside of its CMRS license area is factually incorrect. Dobson has available to it a variety of options for providing service outside of its CMRS license area. It is free under the Commission's rules to fulfill its obligation to provide service throughout the entirety of Frontier's and the other RTCs' study areas by using its own facilities or a combination of its own facilities, including UNEs, and resale.²⁰ The only option that is foreclosed is providing service using its own CMRS facilities outside of its CMRS license area. In this regard, Dobson is no different from the thousands of CLECs that are providing competitive services without having any CMRS licenses. If anything, the fact that Dobson has a CMRS license gives it an advantage that most competitors lack.

It is doubtful that a CLEC ETC applicant would be successful in seeking relief from its obligation to serve the entirety of an RTC's study area on the basis that its lack of a CMRS license prevents it from providing service. The absurdity of such an argument is clear. Yet, it

²⁰ 47 C.F.R. § 54.201(d)(1).

makes more sense to claim that not holding a CMRS license is an impediment to providing service than it does to claim that holding a CMRS license is an impediment to providing service. The Commission should not accept an argument from a CMRS ETC applicant that it cannot serve because it holds a CMRS license.

There is no factual basis to conclude that Dobson cannot provide service outside of its CMRS license area.

C. Designating Dobson As An ETC For Less Than An RTC's Entire Study Area Is Contrary To The Goals Of Universal Service

A goal of universal service is to ensure the provision of service in rural, insular, and high cost areas at affordable rates.²¹ Requiring additional ETC applicants to serve the entirety of an RTC's study area advances that goal. Dobson has available to it a variety of options for providing service throughout Frontier's study area. Allowing it to escape its statutory obligation to serve the entirety of the Frontier's study areas provides no less of a disincentive to Dobson to serve rural areas than allowing any other ETC applicant to escape that obligation.

Because Dobson claims an inability to serve, it is unlikely that it will ever voluntarily decide to begin providing service in the more rural and high cost portions of Frontier's study area. Thus, if customers in the future begin to view Dobson's service as a competing service and consequently to cancel their Frontier service in order to rely solely on their mobile phone, Frontier will be left in the position of having lost low cost customers in several of the most densely populated exchanges while still being required to serve the rural, high cost areas that Dobson is not required to serve. The resulting loss in revenues and unrecovered costs would force up rates in rural areas and would ultimately harm the intended beneficiaries of universal

²¹ 47 U.S.C. § 254(b)(3).

service. To avoid this prospect, Dobson should be designated as an ETC for the entirety of Frontier's study area, if at all.

For all of these reasons, the Commission should not lend its support to designating Dobson as an ETC for less than the entirety of the RTCs' study areas.

V. Dobson's Petition Should Be Held In Abeyance, Or In The Alternative, Designated Only With Respect To The Existing Rules

As the Commission is aware, numerous changes to the USF mechanism and changes to the services supported by universal service are being considered.²² The changes being considered could alter the eligibility requirements for being an ETC and the analytical framework applied in ETC designation proceedings, and could significantly change the workings of the USF mechanism.

Of special importance here, one proposal under consideration is whether to reduce the amount of USF the RTC receives when an additional ETC serves a line in the RTC's study area. This is an especially complex issue with respect to designating CMRS carriers as ETCs because CMRS is not a substitute service. Under the proposals being considered, USF support could flow to the CMRS carrier even though the RTC still is the carrier of last resort and is providing service to the customer as well. The issue is even more fundamental because incumbents' USF receipts are based on the costs of their networks, which remain regardless of how many customers are taking service. In any event, if the incumbent RTC's USF receipts are reduced when an additional ETC is designated, the public interest calculus will change dramatically.

Under the circumstances, any designation of Dobson as an ETC should be based on the current rules and the Commission should expressly state that the designation is not a determination of whether Dobson should be an ETC under any modified rules. The better course

would be for the Commission to cease designating additional ETCs pending resolution of the rulemaking proceedings.

VI. SUMMARY

Designating Dobson as an ETC in Frontier's study areas is not in the public interest. Its circular argument that designating additional ETCs in RTC's study areas is always in the public interest should be rejected, as should its unsupported claims that designating it to be an ETC will advance universal service. Dobson does not compete with Frontier and is not a new entrant, so designating it as an ETC will not promote or increase competition in Frontier's study area. Nor will it bring the benefits of competition to consumers in Frontier's study area.

If Dobson is designated as an ETC in Frontier's study area, it must be designated to serve the entire study area. Dobson can provide service throughout the entirety of the RTC study areas. Relieving of its obligation to do so is contrary to the goals of universal service and to the statute.

Finally, any designation of Dobson as an ETC in Frontier's study areas should be expressly based on a finding that it satisfies the rules as they currently exist and should be effective only as long as the rules remain unchanged. If the rules change as a result of the rulemakings and Joint Board deliberations currently underway, it is likely that the public interest calculus will change. A new determination would then have to be made as to whether designating Dobson as an ETC in Frontier's study area would have to be made under the revised

²² See, e.g., Federal State Joint Board on Universal Service, Notice of Proposed Rulemaking, CC Docket 96-45 (rel. June 8, 2004).

rules. The better course would be for the Commission to cease designating additional ETCs pending resolution of the rulemaking proceedings.

Respectfully Submitted,

**CITIZENS TELECOMMUNICATIONS
COMPANY OF NEW YORK d/b/a
FRONTIER COMMUNICATIONS OF
NEW YORK**

By Counsel:

/s/ John B. Adams
John B. Adams

The Adams Legal Firm, LLC
626C Admiral Drive #312
Annapolis MD 21401

Tel 202-448-9033
Fax 202-448-9040

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